



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

TIDEWATER REGIONAL OFFICE

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L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

Francis L. Daniel
Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT ISSUED TO DISMAL SWAMP PROPERTIES, LLC

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §62.1-44.15(8a) and §62.1-44.15(8d), between the State Water Control Board and Dismal Swamp Properties, LLC, for the purpose of resolving certain violations of environmental law and/or regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "ACOE" means the United States Army Corps of Engineers.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Dismal Swamp Properties" means Dismal Swamp Properties, LLC, certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
6. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.

7. "Order" means this document, also known as a Consent Special Order.
8. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
9. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution" for the terms and purposes of this chapter. 9 VAC 25-210-10.
10. "Property" means the 171.80 acre tract of land at 1900 Portsmouth Boulevard (US Highways 13/58/460) in Suffolk, Virginia, owned by Dismal Swamp Properties.
11. "Reference Point" or "RP" means location indicators on the Property schematic attached as Appendix A.
12. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.
13. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. 9 VAC 25-210-10.
14. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
15. "Va. Code" means the Code of Virginia (1950), as amended.
16. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

17. "Main Road" means a former logging haul road approximately one mile long and 30 feet wide with its eastern terminus at an access road to the Property from US Highways 13/58/460 [RP 11 on the attached Appendix A] and its western terminus at the approximate midpoint of the Property's western boundary (RP 6). The Main Road trends generally west-southwest from its eastern terminus (RP 11) approximately 0.45 mile along the US Highways 13/58/460 right-of-way near the Virginia State Police commercial vehicle inspection station at which point (RP 10) it trends west for 0.55 mile to its western terminus (RP 6).
18. "North Road" means a road approximately 1.3 mile long and 20 feet wide, part of which is a former logging skid trail and part of which is newly constructed, that trends east to west generally along the Property's northern boundary from RP 1 to RP 5.
19. "East Road" means a former logging skid trail approximately 0.15 mile long and 20 feet wide that trends generally north-northwest from the eastern terminus of the Main Road (RP 11) and intersects the North Road at RP 4 approximately 0.4 mile west of the North Road's eastern terminus.
20. "West Road" means a former logging skid trail approximately 0.3 mile long and 20 feet wide that trends generally east-northeast from the western terminus of the Main Road (RP 6) along the Property's western boundary to the North Road's eastern terminus (RP 1).
21. "West Road Extension" means a newly constructed road approximately 0.1 mile long and 20 feet wide that trends generally south-southwest from the intersection of the Main Road and the West Road (from RP 6 to RP 12).
22. "Ancillary Road" means a former logging skid trail approximately 0.2 mile long and 20 feet wide that intersects the Main Road approximately 0.1 mile from its western terminus and from where it trends generally south (from RP 7 to RP 13 to RP 14).
23. "North-South Trail" means a former logging skid trail approximately 0.25 mile long and 10 feet wide that trends generally north-south and that connects the Main Road and North Road approximately 0.2 mile east of their western termini (from RP 2 to RP 9).

SECTION C: Findings of Fact and Conclusions of Law

1. Dismal Swamp Properties owns a 171.80 acre tract of land in Suffolk, Virginia. The Property contains wetlands as determined by the ACOE and is considered part of Dismal Swamp located, in part, in Suffolk, Virginia. Dismal Swamp Properties acquired the Property in May 2003. The Property had been used for silviculture by a previous owner.

2. On October 19, 2007, following a site inspection by a representative of the City of Suffolk, the City of Suffolk representative contacted DEQ about potentially unauthorized wetland impacts on the Property.
3. DEQ staff conducted site visits of the Property on October 22, 2007, and December 18, 2007, reviewed aerial photographs for the period 1994 to 2006, and observed the following:
 - a. Approximately 1.2 miles of road corridor – the West Road Extension (from RP 6 to RP 12) and two segments of the North Road (from RP 1 to RP 2 and from RP 3 to RP 5) – had been constructed. A preexisting segment (approximately 0.2 mile long from RP 2 to RP 3) connected the two newly constructed segments of the North Road.
 - b. Construction of the new road corridors (from RP 1 to RP 2, from RP 3 to RP 5, and from RP 6 to RP 12) resulted in vegetation removal, grading, soil compaction, and the restriction of hydrology.
 - c. Woody debris, uprooted trees, detritus, and soil had been piled adjacent to the 1.2 miles of newly constructed road corridors (from RP 1 to RP 2, from RP 3 to RP 5, and from RP 6 to RP 12).
 - d. A ditch had been excavated along the West Road Extension (approximately 400 linear feet from RP 6 to RP 12).
 - e. An existing drainage ditch to the south of and parallel to the Main Road was extended to the west approximately 200 linear feet (from RP 7 to RP 6).
 - f. Woody debris, uprooted trees, detritus and soil had been piled adjacent to the two newly excavated ditches (from RP 7 to RP 6 and from RP 6 to RP 12; totaling approximately 600 linear feet).
 - g. Woody debris, uprooted trees, detritus and soil had been piled at numerous locations adjacent to five existing road corridors (the Main Road from RP 6 to RP 9, the East Road from RP 4 to RP 11, the West Road from RP 1 to RP 6, the Ancillary Road from RP 7 to RP 14, and the North Road from RP 2 to RP 3; totaling approximately one mile) while performing maintenance thereon.
 - h. The North-South Trail (from RP 2 to RP 9) and two areas along the Main Road (at RP 8 and RP 9) were cleared of vegetation and woody debris, detritus and soil piled along their perimeters.
4. Virginia Code §62.1-44.5.A states “Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; 2. Excavate in a wetland; 3. Otherwise alter the physical, chemical or biological

properties of state waters and make them detrimental to the public health, or to animal or aquatic life or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses, or 4. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions.”

5. Virginia Code §62.1-44.15:20.A states “Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impoundment; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal, or aquatic life.”
6. The Virginia Water Protection (“VWP”) Program Regulation at 9 VAC 25-210-50 states “Except in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, withdraw surface waters, otherwise alter the physical, chemical, or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life; or the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands or on or after October 1, 2001, conduct the following activities in a wetland: 1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 2. Filling or dumping; 3. Permanent flooding or impounding; or 4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.”
7. Dismal Swamp Properties did not obtain a permit to impact wetlands on the Property.
8. The woody debris, uprooted trees, detritus and soil piled in wetlands adjacent to the six road corridors, two ditches and three clearings are fill material. The placement of fill in State waters without a permit constituted the discharge of a pollutant that significantly altered wetlands functions.
9. Dismal Swamp Properties has violated VA Code §§ 62.1-44.5.A and 62.1-44.15:20.A and 9 VAC 25-210-50 by impacting approximately 4.4 acres of wetlands as detailed in paragraph C.3 above and as graphically represented as “Previously Disturbed Wetlands” in Appendix A. Impacts were determined by DEQ and ACOE field observations and examination of aerial photographs.
10. On October 31, 2007, DEQ issued NOV No. W2008-11-TRO-001 to Dismal Swamp Properties, advising of the above listed facts and applicable statutory and regulatory citations.

11. DEQ forwarded to the ACOE a copy of the October 31, 2007 NOV. ACOE staff conducted a site visit of the Property on November 15, 2007. By letter dated November 20, 2007, the ACOE confirmed to Dismal Swamp Properties the impacts to non-tidal, forested wetlands on the Property.
12. Based on the ACOE confirmation of November 20, 2007, the construction of the two road corridors (as noted in subparagraph C.3.a of this Order), the excavation of the two ditches (as noted in subparagraphs C.3.d and C.3.e of this Order), and the deposit of fill material adjacent to the six road corridors, two ditches and three clearings (as noted in subparagraphs C.3.c, C.3.f, C.3.g and C.3.h of this Order), occurred in wetlands.
13. Dismal Swamp Properties submitted to DEQ a Preliminary Wetland Determination for the Property dated February 29, 2008, that identified the entire Property as a wetland with the exception of the Main Road corridor and the Property boundary along the US Highways 13/58/460 right-of-way. Dismal Swamp Properties forwarded the Preliminary Wetland Determination to the ACOE by letter dated March 25, 2008, requesting that the ACOE confirm the delineation reported therein. As of July 1, 2008 the ACOE had not confirmed the delineation.
14. At meetings on November 15, 2007, December 18, 2007, and March 26, 2008, a representative of Dismal Swamp Properties stated that the Property was being prepared for use as a hunting preserve and that the only work that had been done on the Property was the routine maintenance of existing logging roads and ditches and the removal from existing roads of trees that had fallen during Hurricane Isabel in September 2003.
15. The construction and maintenance of the six road corridors, the excavation of two new drainage ditches, and the deposit of fill material on the Property do not meet the exemption provided for in the VWP Program Regulation at 9 VAC 25-210-60 for construction or maintenance of forest roads. The roads were not being used by Dismal Swamp Properties for silviculture operations and were not constructed or maintained in accordance with Best Management Practices as required for an exemption from VWP permitting requirements for the construction or maintenance of forest roads in wetlands.
16. The construction and maintenance of the six road corridors, the excavation of two new drainage ditches, and the deposit of fill material on the Property do not meet the exemption provided for in the VWP Program Regulation at 9 VAC 25-210-60 for emergency maintenance of recently damaged transportation and utility structures resulting from Hurricane Isabel, which occurred in September 2003, as the construction, maintenance and excavation did not occur within a reasonable period of time after the damage occurred and changed the character, scope and size of the pre-existing roads, trails and ditches.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders Dismal Swamp Properties, and **Dismal Swamp Properties agrees, to perform the actions described in Appendix B of this Order.** In addition, the Board orders Dismal Swamp Properties, and **Dismal Swamp Properties voluntarily agrees, to pay a civil charge of \$16,380** within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall note that it is being made pursuant to this Order and shall include Dismal Swamp Properties' Federal Identification Number. Payment shall be made by check payable to the "Treasurer of Virginia", delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Dismal Swamp Properties, for good cause shown by Dismal Swamp Properties, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to Dismal Swamp Properties by DEQ on October 31, 2007. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. For purposes of this Order and subsequent actions with respect to this Order, Dismal Swamp Properties admits the jurisdictional allegations, but neither admits nor denies the findings of fact and conclusions of law contained herein.
4. Dismal Swamp Properties consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Dismal Swamp Properties declares it has received fair and due process under the Administrative Process Act, Va. Code §2.2-4000 *et seq.*, and the State Water Control Law and waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by Dismal Swamp Properties to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Dismal Swamp Properties shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Dismal Swamp Properties shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Dismal Swamp Properties shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on Dismal Swamp Properties, its successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Dismal Swamp Properties. Notwithstanding the foregoing, Dismal Swamp Properties agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Dismal Swamp Properties. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Dismal Swamp Properties from its obligation to

comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, Dismal Swamp Properties voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 17 day of October, 2008.

Francis L. Daniel
Francis L. Daniel

Dismal Swamp Properties voluntarily agrees to the issuance of this Order.

By: [Signature]

Date: Aug 27, 2008

Commonwealth of Virginia

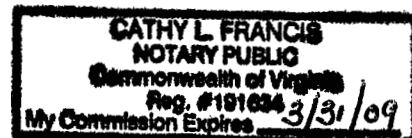
City/County of Virginia Beach

The foregoing document was signed and acknowledged before me this 27 day of August, 2008, by Michael Randolph Butler, who is
(name)

President
(title) of Dismal Swamp Properties on behalf of Dismal Swamp Properties, LLC

Cathy L. Francis
Notary Public

My commission expires: March 31, 2009



APPENDIX A
Dismal Swamp Properties, LLC
Not to scale

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<u>RP</u>	<u>Road or clearing</u>
1-5	= North Road (approx 1.3 mi x 20')
6-11	= Main Road (approx 1.0 mi x 30')
4-11	= East Road (approx 0.15 mi x 20')
1-6	= West Road (approx 0.3 mi x 20')
6-12	= West Road Extension (appr 0.1 mi x 20')
7-14	= Ancillary Road (approx 0.2 mi x 20')
2-9	= North-South Trail (approx 0.25 mi x 10')
8 and 9	= Clearings
(RP = Reference Point on schematic below)	

Previously Disturbed Wetlands as noted in this Consent Special Order:

New Roads: RP 1 to RP 2 and RP 3 to RP 5

RP 6 to RP 12

New Ditches: RP 6 to RP 7

RP 6 to RP 12

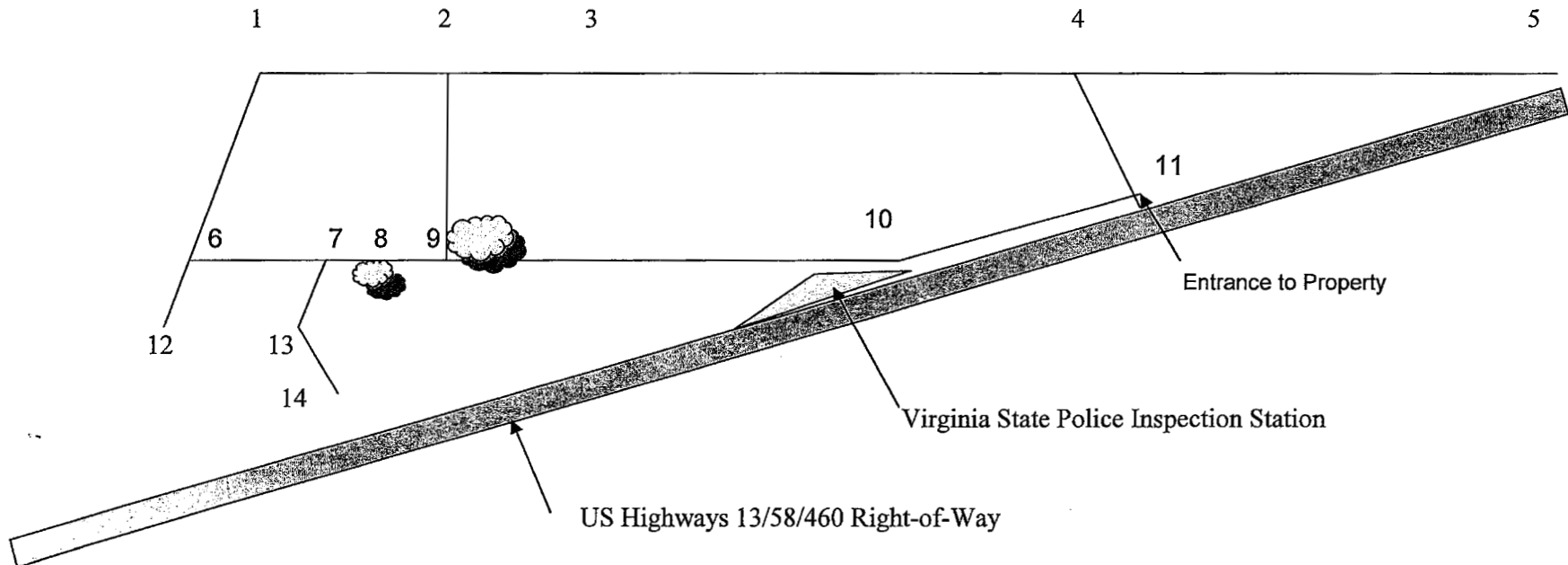
Deposit of Fill: Alongside the Main Road (from RP 6 to RP9)

Alongside the other five roads (from RP 1 to RP 5, RP 1 to RP 6, RP 6 to RP 12, RP 7 to RP 14 and RP 4 to RP 11)

Alongside the two new ditches (from RP 6 to RP 7 and RP 6 to RP 12)

Alongside the North-South Trail (from RP 2 to RP 9)

Around the perimeters of Clearings at RP 8 and RP 9



APPENDIX B
SCHEDULE OF COMPLIANCE

1. Within 5 days of receiving from the ACOE confirmation of the Preliminary Wetland Determination dated February 9, 2008, referenced in paragraph C.13 of this Order, Dismal Swamp Properties shall provide the confirmation results to DEQ.
2. Within 60 days of receiving ACOE's delineation confirmation, Dismal Swamp Properties shall:
 - a. Submit to the Virginia Marine Resources Commission, with copies to DEQ and the ACOE, a Joint Permit Application ("JPA") requesting authorization for any **proposed permanent impacts** to the Previously Disturbed Wetlands on the Property, as described in Appendix A of this Order. The JPA shall contain all of the information required by 9 VAC 25-210-80.B. This does not limit the rights of Dismal Swamp Properties to apply for a permit for impacts to wetlands in the future.
 - b. Submit to DEQ for review and approval a restoration plan and schedule that proposes measures to restore the Previously Disturbed Wetlands, as described on Appendix A of this Order, on the Property that are **not proposed for permanent impact** by the JPA. The restoration plan and schedule shall include, but not be limited to: re-grading to the original contours of the land, all soil, uprooted trees and woody debris (including removal as needed to obtain original contours) located within delineated wetlands on the Property and described as Deposit of Fill on Appendix A of this Order; and repair or replacement of the two culverts that cross under the Main Road between RP 7 and RP 9 to their original function. Dismal Swamp Properties shall implement the plan and schedule within 30 days of DEQ approval. The restoration plan and schedule submitted pursuant to this Item 2.b shall become part of and enforceable under the terms of the VWP permit.
3. In the event Dismal Swamp Properties withdraws the JPA submitted pursuant to Item 2.a of this Appendix B, the ACOE denies the permit, or DEQ issues a notice to tentatively deny the VWP permit, Dismal Swamp Properties shall, within 60 days of such action, submit to DEQ for review and approval a restoration plan and schedule (or a revision of the restoration plan and schedule previously submitted pursuant to Item 2.b of Appendix A) that proposes measures to restore **all** of the Previously Disturbed Wetlands on the Property, as described on Appendix A of this Order. The restoration plan and schedule shall include, but not be limited to: re-grading to the original contours of the land, all soil, uprooted trees and woody debris (including removal as needed to obtain original contours) located within delineated wetlands on the Property and described as Deposit of Fill on Appendix A of this Order; repair or replacement of the two culverts that cross under the Main Road between RP 7 and RP 9 to their original function. Dismal Swamp Properties shall implement the plan and schedule within 30 days of DEQ approval. The restoration plan and schedule submitted pursuant to this Item 3 (or Item 4 below) shall

become part of and enforceable under the terms of this Order as noted in paragraph E.6 hereof.

4. In the event Dismal Swamp Properties proposes to restore all of the Previously Disturbed Wetlands, as described on Appendix A of this Order, without submitting a JPA for permanent impacts, Dismal Swamp Properties shall, within 60 days of receiving the ACOE's delineation confirmation, submit to DEQ for review and approval the restoration plan and schedule provided for in Item 3 of this Appendix B.
5. Dismal Swamp Properties shall respond to any notices of deficiency regarding submittals to DEQ (required under either Item 2.a, Item 2.b, Item 3, or Item 4 of this Appendix B) within 30 days of receipt of any such notices. Failure to correct deficiencies after the issuance of three notices of deficiency will be considered a violation of this Order as noted in paragraph E.6 of this Order.
6. Mail all submittals and reports required by this Appendix B to:

Francis L. Daniel, Regional Director
DEQ, Tidewater Regional Office
5636 Southern Boulevard
Virginia Beach, Virginia 23462